

# The Ohio Physician-Patient Privilege: Modified, Revised, and Defined

## I. INTRODUCTION

The physician-patient privilege is neither a new phenomenon that has thrust itself upon the legal community nor an area of the law that is rapidly changing. Recognition of the privilege began in the early nineteenth century,<sup>1</sup> and, despite occasional legislative tinkering, it remains relatively unaltered.

Numerous articles have been written about the privilege as it exists both nationwide<sup>2</sup> and in Ohio.<sup>3</sup> However, the Ohio Tort Reform Act of 1987,<sup>4</sup> hailed as one of the most dramatic tort law revisions ever, alters the scope and applicability of Ohio's physician-patient privilege. Since the revisions included in the Tort Reform Act only recently became effective,<sup>5</sup> a contemporary analysis of Ohio's physician-patient privilege is indeed timely and essential.

This Note will discuss the history of the physician-patient privilege up to and including changes brought about by the Tort Reform Act of 1987. A limited discussion will address portions of the privilege unaltered by the Tort Reform Act, with detailed analysis devoted to those provisions of the privilege most affected by the Act. Finally, this Note will discuss areas of the privilege that need further refinement.

## II. HISTORY OF THE PHYSICIAN-PATIENT PRIVILEGE

### A. General History

The physician-patient privilege is a creature unknown to common law. As early as 1776 in *Dutchess of Kingston's Trial*,<sup>6</sup> English courts determined that if a physician voluntarily revealed information obtained through the physician-patient relationship to the general public, the physician would be guilty of a breach of honor and a great indiscretion. The court, however, did not legally recognize a physician-patient privilege. Thus, under the common law, if a physician revealed information

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1. See *infra* note 2 and accompanying text.

2. See generally Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980); Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383 (1952); Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943 (1959); Note, *The Scope of the Physician-Patient Privilege in Criminal Actions: A New Balancing Test*, 64 NEB. L. REV. 772 (1985); Note, *The Physician-Patient Privilege*, 56 NW. U.L. REV. 263 (1961); and Case Comment, *Mathis v. Hilderbrand*, 416 P.2d 8 (Alaska 1966), 36 U. CIN. L. REV. 152 (1967).

3. DeWitt, *Privileged Communications Between Physician and Patient*, 10 W. RES. L. REV. 488 (1959); Johnston, *Breach of Medical Confidence in Ohio*, 19 AKRON L. REV. 373 (1986); O'Neill, *Ohio's Physician-Patient Privilege in Personal Injury Cases - Time for Reform*, 16 W. RES. L. REV. 334 (1965); Stewart, *Physician-Patient Privilege in Ohio*, 8 CLEVEL.-MAR. L. REV. 444 (1959); Case Comment, *Parisky v. Perstorff*, 63 OHIO APP. 503, 27 N.E.2d 254 (1939), 7 OHIO ST. L.J. 92 (1941); and Case Comment, *In Re Roberto*, 106 OHIO APP. 303, 151 N.E.2d 37 (1958), 28 U. CIN. L. REV. 534 (1959).

4. See *infra* notes 43-47 and accompanying text.

5. See *infra* note 47.

6. 20 How. St. Tr. 355, 573 (1776), reprinted in NOTABLE BRITISH TRIALS SERIES (Melville ed. 1927), noted in 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380, at 818 (J. McNaughton rev. ed. 1961).

concerning a patient's physical or mental condition while testifying in court, no breach of the physician-patient relationship resulted.

American courts initially followed the English precedent and refused to recognize the physician-patient privilege.<sup>7</sup> In 1828, however, the state of New York, through statutory innovation, established a physician-patient privilege.<sup>8</sup> Revisers of the New York statute justified this creation by stating:

The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance.<sup>9</sup>

Missouri followed New York's lead in 1835,<sup>10</sup> and to date forty states and the District of Columbia have adopted some form of the physician-patient privilege.<sup>11</sup>

Even though most states that have adopted the physician-patient privilege have embraced the same reasoning asserted by New York, some commentators still discount any necessity for the physician-patient privilege. Professor Wigmore, for example, believes more persuasive arguments stand against the physician-patient privilege than stand for it.<sup>12</sup> According to Professor Wigmore, most communications

7. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2380, at 819 n.3 (J. McNaughton rev. ed. 1961).

8. N.Y. REV. STAT. 406, § 73 (1828).

9. N.Y. REV. STAT. 737 (1836). New York lawmakers saw the adoption of the privilege as an encouragement for those in need of medical assistance to seek it. *See, e.g., Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876).

10. WIGMORE, *supra* note 7, at 820.

11. The following states have adopted a physician-patient privilege: Alaska, ALASKA R. EVID. 504; Arizona, ARIZ. REV. STAT. ANN. § 12-2235 (1982); Arkansas, ARK. R. EVID. 503; California, CAL. EVID. CODE §§ 990-1007 (West 1966 & Supp. 1988); Colorado, COLO. REV. STAT. § 13-90-107(d) (1987); Delaware, DEL. UNIF. R. EVID. 503; District of Columbia, D.C. CODE ANN. § 14-307 (1981 & Supp. 1988); Georgia, GA. CODE ANN. § 24-9-40 (Supp. 1988); Hawaii, HAW. R. EVID. 504 (1985); Idaho, IDAHO CODE § 9-203.4 (1979 & Supp. 1988); Illinois, ILL. ANN. STAT. ch. 110, para. 8-802 (Smith-Hurd Supp. 1988); Indiana, IND. CODE ANN. § 34-1-14-5 (West 1983); Iowa, IOWA CODE ANN. § 622.10 (West Supp. 1988); Kansas, KAN. STAT. ANN. § 60-427 (1983); Louisiana, LA. REV. STAT. ANN. § 15:476 (West 1981); Maine, ME. R. EVID. 503; Michigan, MICH. COMP. LAWS ANN. § 600.2157 (West 1986); Minnesota, MINN. STAT. ANN. § 595.02(1)(d) (West 1988); Mississippi, MISS. CODE ANN. § 13-1-21 (Supp. 1987); Missouri, MO. ANN. STAT. § 491.060(5) (Vernon Supp. 1988); Montana, MONT. CODE ANN. § 26-1-805 (1987); Nebraska, NEB. REV. STAT. § 27-504 (1985); Nevada, NEV. REV. STAT. ANN. §§ 49.215-.245 (Michie 1986 & Supp. 1988); New Hampshire, N.H. REV. STAT. ANN. § 329:26 (Supp. 1987); New Jersey, N.J. STAT. ANN. § 2A:84A-22.2 (West 1976); New York, N.Y. CIV. PRAC. L. & R. 4504(a) (McKinney Supp. 1988); North Carolina, N.C. GEN. STAT. § 8-53 (1987); North Dakota, N.D. R. EVID. 503; Ohio, OHIO REV. CODE ANN. § 2317.02(B) (Anderson Supp. 1987); Oklahoma, OKLA. STAT. ANN. tit. 12, § 2503 (West Supp. 1988); Oregon, OR. REV. STAT. ANN. § 40.235 (Butterworth 1988); Pennsylvania, PA. CONS. STAT. ANN. tit. 42, § 5929 (Purdon 1982); Rhode Island, R.I. GEN. LAWS § 5-37.3-4 (1987); South Dakota, S.D. CODIFIED LAWS §§ 19-13-6 to -11 (Michie 1987); Texas, TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08 (Vernon Supp. 1988); Utah, UTAH CODE ANN. § 78-24-8(4) (1987); Vermont, VT. STAT. ANN. tit. 12, § 1612(a) (Supp. 1986); Virginia, VA. CODE ANN. § 8.01-399 (1984); Washington, WASH. REV. CODE ANN. § 5.60.060(4) (Supp. 1988); Wisconsin, WIS. STAT. ANN. § 905.04 (West Supp. 1987); Wyoming, WYO. STAT. § 1-12-101(a)(i) (1977).

Since each state's physician-patient privilege statute differs in scope and applicability, each statute should be analyzed separately to determine whether the privilege attaches to a given situation. However, discussion in this Note may be helpful to understand how the various provisions operate.

12. WIGMORE, *supra* note 7, § 2380A, at 829-32.

with a physician are not intended to be confidential in nature, because most ailments are readily apparent;<sup>13</sup> by merely observing the patient, one can ascertain the source of the patient's ailments. Even when medical disorders are not readily identifiable, friends and relatives often discuss their ailments openly, thereby making them known to others outside the physician-patient relationship.<sup>14</sup>

Further, Wigmore contends that patients will seek medical assistance and disclose all relevant information without any privilege.<sup>15</sup> In support of his assertion, he indicates that citizens in states lacking the privilege do not suffer from inferior medical care.<sup>16</sup> Finally, he argues that nothing indicates that once the privilege is established, long-concealed ailments are suddenly brought to the attention of medical personnel.<sup>17</sup>

Although Wigmore believes the physician-patient relationship should be fostered, he contends that the concealment of medical information can cause greater injury to justice than the disclosure of it.<sup>18</sup> Patients may use the privilege to conceal medical information when injuries are not as extensive as claimed<sup>19</sup> or when the patient is not injured at all;<sup>20</sup> thus, the patient is allowed to prevent opposing counsel from obtaining vital information when preparing his<sup>21</sup> case. Though these arguments have merit, the physician should not have an unfettered right to discuss the patient's physical and emotional problems unless so directed by the patient.

Prior to the adoption of the physician-patient privilege, a social stigma was attached to those who suffered from disease. Out of fear of public ridicule, people attempted to conceal their ailments and did not seek medical assistance. To eliminate this hesitancy, early legislators adopted the physician-patient privilege,<sup>22</sup> which enabled patients to discuss their medical disorders openly and without fear that others would learn of their disease.

In addition, the right to privacy is an influential justification for the privilege.<sup>23</sup> Patients expect their communications with physicians to be held confidential.<sup>24</sup> The

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13. *Id.* at 829.

14. *Id.*

15. *Id.* at 829-30.

16. *Id.*

17. *Id.* at 829.

18. *Id.* at 830.

19. *City of Portsmouth v. Cilumbrello*, 204 Va. 11, 15, 129 S.E.2d 31, 34 (1963). The city questioned the extent of the defendant's injuries when the defendant fell through one of the city's manholes. Since Virginia waives the physician-patient privilege when the patient's physical condition is at issue in a case, the city was permitted to receive a copy of the defendant's medical reports, from which the extent of the patient's injuries could be determined.

20. WIGMORE, *supra* note 7, § 2389, at 855.

21. The author wishes to acknowledge that throughout the Article masculine pronouns will be used. This in no way infers that only individuals of the male gender experience problems with the physician-patient privilege. However, for the sake of clarity, masculine pronouns will be used with the intent to refer to both genders.

22. See *infra* notes 26-27 and accompanying text.

23. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 618-19 (1980). Even though Professor Wigmore argues that communications to physicians would be made even without the existence of a physician-patient privilege, see WIGMORE, *supra* note 7, § 2380a, at 829, there still exists the possibility that a patient may desire his ailment to remain private, and thus would not disclose it due to the lack of a privilege.

24. See *infra* notes 147-48 and accompanying text. One may argue that a patient's expectation that communications with his physician will remain confidential is based upon the fact that the physician-patient privilege has existed for some time. While this assertion has some merit, the medical profession has practiced under the belief that communications are to be held confidential even longer than the physician-patient privilege has existed. See *infra* note 148.

privacy rationale seems more persuasive than any other in today's environment, in which less social stigma is associated with seeking medical attention.<sup>25</sup>

Proponents of the privilege seek to promote general health by assuring that intimate details discussed with a physician will not generally be disclosed, and thereby minimize the possibility of "humiliation, embarrassment, or disgrace."<sup>26</sup> It has been argued that open communication between patients and medical personnel will be fostered as well as the dissemination of all relevant information needed by treating physicians to diagnose and treat their patients accurately.<sup>27</sup>

Even though some may argue that the physician-patient privilege does not promote general health in today's society, a basic assumption still exists that a patient will feel more secure in disclosing his medical problems when he knows that they cannot be openly discussed by the physician with others without the patient's prior consent. This point can be better understood when dealing with mental disorders or controversial diseases such as Acquired Immune Deficiency Syndrome (commonly referred to as AIDS).<sup>28</sup> A patient should not be deprived of his right to associate freely in society simply because a physician has acquired information concerning the patient's physical or mental condition while treating the patient.<sup>29</sup> If it were indeed the case that physicians could freely disclose that an individual has contracted a disease such as AIDS, surely fewer individuals susceptible to the disease would be

25. Medical attention is readily available today. In fact, numerous facilities have been constructed that cater to emergency-related ailments. These facilities require no appointments and the physician on call will handle the problem, eliminating the need to have a family physician. These facilities attempt to provide quick, efficient, and reliable care.

The number of hospitals has grown at a tremendous rate. Due to the large number of available beds, many hospitals now advertise their facilities, indicating that medical care is available when one is in need. This openness to medical care has eliminated the once apparent negative social stigma related to physical ailments. No longer is society ignorant about the manner in which diseases are contracted; in fact, most friends and relatives offer their support and encouragement when another is in need of care.

26. Note, *The Physician-Patient Privilege*, 56 NW. U.L. REV. 263, 266 (1961).

27. Note, *The Scope of the Physician-Patient Privilege in Criminal Actions: A New Balancing Test*, 64 NEB. L. REV. 772, 773 (1985). See also *Edington v. Mutual Life Ins. Co.*, 67 N.Y. 185, 194 (1876). Interpreting the New York statute, the court in *Edington* stated that the privilege:

. . . is a just and useful enactment, introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sick bed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship.

28. See generally Carey & Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD. L. REV. 284 (1987); Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11 (1985); Leonard, *Employment Discrimination Against Persons with AIDS*, 10 U. DAYTON L. REV. 681 (1985); Mawdsley, *Commentary: Privacy Rights of AIDS Victims*, 31 W. EDUC. L. REP. 697 (1986); Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707 (1987); Comment, *When Private Morality Becomes Public Concern: Homosexuality and Public Employment*, 24 Hous. L. REV. 519 (1987); Note, *Employment Discrimination and AIDS: Is AIDS a Handicap Under Section 504 of the Rehabilitation Act?*, 38 U. FLA. L. REV. 649 (1986); Comment, *AIDS and Employment Discrimination Under the Federal Rehabilitation Act of 1973 and Virginia's Rights of Persons with Disabilities Act*, 20 U. RICH. L. REV. 425 (1986); Note, *Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis*, 25 WASHBURN L.J. 505 (1986); Note, *AIDS and Employment: An Epidemic Strikes the Workplace and the Law*, 8 WHITTIER L. REV. 651 (1986).

29. The reader should be warned, however, that under certain circumstances, a physician is legally required to report infectious diseases to the appropriate health authority. See, for example, OHIO REV. CODE ANN. § 3707.06 (Anderson Supp. 1987), where a treating physician is required to report the "name, age, sex, and color of the patient, and the house and place in which the sick person may be found." Infectious diseases requiring reporting include "cholera, plague, yellow fever, typhus fever, diphtheria, typhoid fever, or any other disease dangerous to the public health, or required by the department of health." *Id.* While this reporting requirement may infringe upon the realm of privileged communications between a physician and patient, the validity of statutes like § 3707.06 is beyond the scope of this Note.

apt to seek medical assistance out of fear of being publicly humiliated or even losing a job.<sup>30</sup> Ultimately, such actions would retard the medical profession's goal of controlling and eliminating the disease.

Another basis for the privilege lies in the degree of influence that the medical profession wields in the various state legislatures.<sup>31</sup> Physicians lobby for the privilege, and their presence in the political arena allows them to be successful in their pursuit.<sup>32</sup> The privilege is sought and retained to protect the "honor of their profession."<sup>33</sup>

Even though there are varied views concerning the necessity of the physician-patient privilege, it continues to thrive in the majority of states, and will likely continue to do so in the future.<sup>34</sup>

### B. *History of the Physician-Patient Privilege in Ohio*

Ohio first adopted a version of the physician-patient privilege in 1880.<sup>35</sup> Section 5241 of the Ohio Code stated that a physician could not testify "concerning a communication made to him by his patient in that relation, or his advice to his patient."<sup>36</sup> Further, the statute allowed the privilege to be waived by either the express consent of the patient or his act of testifying voluntarily.<sup>37</sup> In either case, the treating physician could be compelled to testify—if he did not voluntarily do so—when the privilege had been waived.<sup>38</sup>

The next version of the physician-patient privilege still allowed the patient to waive his privilege through express consent or by testifying voluntarily about his

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30. WIGMORE, *supra* note 7, § 2380a, at 831.

31. *See supra* note 30.

32. The American Medical Association (AMA) has had a dramatic influence on the political arena. The AMA is an organization that represents all practicing physicians. As proof of the AMA's influence upon legislation, from 1948 through 1962 the AMA was the top reported lobbying spender. J. DEAKIN, *THE LOBBYISTS* 240-43 (1966).

Besides joining the AMA, physicians contribute to the AMA's political causes. "The American Medical Political Action Committee, political fund-raising arm of the A.M.A., claimed that one-fourth to one-third of the A.M.A.'s . . . members had joined AMPAC." *Id.* at 242-43. Besides lobbying through registered lobbyists, the AMA also contributes to political candidates. It has been noted that in this decade more than 90% of the House members have received at least one contribution from the AMA. J. BERRY, *THE INTEREST GROUP SOCIETY* 174-75 (1984). This indicates that the AMA is a very influential and powerful political interest organization. Due to the AMA's financial support, recipients of contributions will listen very intently when an issue affecting the medical profession is introduced in Congress. This author in no way espouses the idea that financial backing assures political success; however, human nature does tend to give additional consideration to issues that affect financial supporters.

33. WIGMORE, *supra* note 7, § 2380a, at 830.

34. Most states recognize the physician-patient privilege. *See supra* note 11. To date, no state has withdrawn the privilege after adopting it. In fact, the number of states recognizing the privilege has gradually grown.

35. OHIO REV. STAT. § 5241(1) (1880). The early physician-patient privilege in Ohio stated:

The following persons shall not testify in certain respects:

1. [A] physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the . . . physician may testify by express consent of the . . . patient; and if the . . . patient voluntarily testifies, the . . . physician may be compelled to testify on the same subject.

36. *Id.*

37. *Id.*

38. *Id.*

injury.<sup>39</sup> In addition, the patient automatically waived the privilege by filing a medical malpractice claim against the physician.<sup>40</sup> When a medical malpractice claim was filed, the waiver only extended to essential issues in the suit.<sup>41</sup> Further, if the patient was deceased, the surviving spouse, executor, or administrator of the estate could expressly waive the privilege.<sup>42</sup>

In 1986, the General Assembly of the State of Ohio debated Senate Bill No. 330.<sup>43</sup> Commonly referred to as the Tort Reform Act, this measure contained proposed amendments modifying various tort principles within the state, including the physician-patient privilege.<sup>44</sup> The Tort Reform Act attempted to level the playing

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39. OHIO REV. CODE ANN. § 2317.02 (Anderson 1981 & Supp. 1986). The immediate predecessor to the current physician-patient privilege stated:

The following persons shall not testify in certain respects:

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(B) A physician concerning a communication made to him by his patient in that relation or his advice to his patient, except that the physician may testify by express consent of the patient or, if the patient is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased patient and except that, if the patient voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject, or if the patient, his executor or administrator, files a medical claim, as defined in division (D)(3) of section 2305.11 of the Revised Code, the filing shall constitute a waiver of this privilege with regard to the care and treatment of which complaint is made. This division applies to doctors of medicine, doctors of osteopathic medicine, and doctors of podiatric medicine.

40. *Id.*

41. *Otto v. Miami Valley Hosp. Soc'y*, 26 Ohio Misc. 72, 75, 266 N.E.2d 270, 272 (1971). The court in *Otto* determined that a physician may disclose communications in defending an action for malpractice. The Ohio Supreme Court followed this view in *Moore v. Grandview Hosp.*, 25 Ohio St. 3d 194, 495 N.E.2d 934 (1986), but refused to extend the same status to a nondefendant physician. *See also Awtry v. United States*, 27 F.R.D. 399 (S.D.N.Y. 1961) (holding that the appropriate privileged communication statute does not apply in an action against the physician for malpractice); *Becknell v. Hosier*, 10 Ind. App. 5, 37 N.E. 580 (1894); *Terier v. Dare*, 146 A.D. 375, 131 N.Y.S. 51 (1911).

42. *See supra* note 39.

43. Senate Bill 330 was introduced on February 19, 1986. It passed the Senate on February 27, 1986, by a vote of 18 to 13. The House received the bill on March 28, 1986 and passed it on September 4, 1986, by a vote of 87 to 8. The Senate refused to concur on the House amendments on November 12, 1986, by a vote of 29 to 0. The Senate refused to pass a conference committee's report on November 12, 1986 by a vote of 15 to 15, whereas the House agreed to the report by a vote of 78 to 17. A second Conference Committee report went to the Senate on the same day, where the Senate and House both agreed to the committee's report by a vote of 20 to 10 and 69 to 16, respectively. The Bill went to Governor Celeste on December 12, 1986, and he vetoed it on December 19, 1986. The Senate attempted to override the Governor's veto on December 23, 1986, but the objection was sustained by a vote of 19 to 12. Thus, the Tort Reform Act was not passed in 1986. 1986 Ohio Legis. Serv. 3-26 (Baldwin).

44. The Tort Reform Act of 1987 has impacted virtually every area of civil litigation.

[The Act made] numerous changes in civil justice law relative to evidence in wrongful death and other tort cases; complaints in certain tort actions; the disclosure and deduction of collateral benefits; punitive or exemplary damages; joint and several liability in comparative negligence actions; the physician-patient testimonial privilege; frivolous conduct in civil actions; periodic payments of certain future damages awards; and contingent fee agreements and attorney's closing statements.

[The Act] establishe[d] a comprehensive statutory scheme to govern product liability claims.

[The Act further] ma[kes] changes in insurance law to authorize state banks and savings and loan associations to invest in domestic property/casualty reinsurance companies; to clarify and strengthen the regulatory powers of the Superintendent of Insurance; to regulate insurance company termination of independent insurance agents' contracts and their customers' policies; to require the Superintendent to adopt a rule to require certain commercial insurers to file, with their annual reports, detailed supplemental reports for certain specified types of commercial insurance; to establish the Ohio Commercial Market Assistance Plan (MAP) and a standby Ohio Commercial Joint Underwriting Association to be placed in operation if the MAP is unsuccessful; to establish "prior approval" requirements for property/casualty insurers' adoption of any form of policy, endorsement, or rider and also, if a rule is adopted, for specified lines of commercial insurance coverage; to regulate the cancellation, nonrenewal, and conditional nonrenewal of commercial insurance policies; and to

field in a civil justice system where a heavy preference had been given to defendants.<sup>45</sup> The Tort Reform Act, as proposed in 1986, however, never passed.<sup>46</sup>

The Act was reintroduced in 1987, passed the General Assembly, met with the Governor's approval, and became effective on January 5, 1988.<sup>47</sup> Thus, a major overhaul of the civil justice system was accomplished in Ohio, which included some dramatic changes in the physician-patient privilege.

### III. THE CURRENT STANDING OF THE PHYSICIAN-PATIENT PRIVILEGE UNDER OHIO REVISED CODE SECTION 2317.02

The revised version of section 2317.02<sup>48</sup> has expanded the number of ways by which the physician-patient privilege may be waived. The patient or a guardian may

establish and specify the duties of a joint select committee to be known as the Insurance/Civil Justice Reform Review Committee.

1987 Ohio Legis. Serv. 5-839 (Baldwin).

For further discussion concerning the Tort Reform Act of 1987 and the various provisions affected, see OHIO LEGAL CENTER INSTITUTE, *THE NEW TORT REFORM ACTS OF 1987* (1987).

45. Telephone interview with Representative John Shivers, Democrat from Columbiana County, District 3 (Nov. 5, 1987). Representative Shivers drafted the current language in Ohio Revised Code § 2317.02.

46. See *supra* note 43.

47. House Bill 1 was introduced on January 14, 1987. The Tort Reform Act passed the House on February 17, 1987, by a vote of 82 to 12. The Senate Select Committee on Tort Reform received the bill on February 17, 1987. The Senate passed the bill on June 24, 1987, by a vote of 19 to 13. A conference committee made recommendations concerning the Tort Reform Act and both the House and Senate approved the committee's recommendations. The House passed the recommendations on September 24, 1987, by a vote of 76 to 16, and the Senate passed the recommendations on September 30, 1987, by a vote of 19 to 13. Governor Celeste signed the Tort Reform Act on October 5, 1987, making it effective on January 5, 1988. 1987 Ohio Legis. Serv. 3-3 (Baldwin).

48. OHIO REV. CODE ANN. § 2317.02 (Anderson Supp. 1987). The provisions of § 2317.02 that relate to the physician-patient privilege are as follows:

The following persons shall not testify in certain respects:

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(B)(1) A physician concerning a communication made to him by his patient in that relation or his advice to his patient, except as otherwise provided in this division and division (B)(2) of this section, and except that, if the patient is deemed by section 2151.421 [2151.42.1] of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

The testimonial privilege under this division is waived, and a physician may testify or may be compelled to testify in a civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under the following circumstances:

(a) If the patient or the guardian or other legal representative of the patient gives express consent;

(b) If the patient is deceased, the spouse of the patient or his executor or administrator gives express consent;

(c) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.11 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the patient if deceased or of his estate, or his guardian or other legal representative.

(2) If the testimonial privilege described in division (B)(1) of this section is waived as provided in division (B)(1)(c) of this section, a physician may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to him by the patient in question in that relation, or his advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim, dental claim, chiropractic claim, or optometric claim, action for wrongful death, other civil action, or claim under Chapter 4123. of the Revised Code.

(3) As used in divisions (B)(1) and (2) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for a patient. A "communication" may include, but is not limited to, any medical, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, X-ray, photograph, financial statement, diagnosis, or prognosis.

(4) Divisions (B)(1), (2), and (3) of this section apply to doctors of medicine, doctors of osteopathic medicine, and doctors of podiatric medicine.

expressly consent to the waiver.<sup>49</sup> If the patient is deceased, either the surviving spouse, executor, or administrator may waive the privilege by express consent.<sup>50</sup> Further, the filing of either a malpractice claim, wrongful death action, worker's compensation claim, or any other civil action constitutes a compulsory waiver of the physician-patient privilege.<sup>51</sup>

Section 2317.02 also defines which types of communications may be obtained from the administering physician, as well as the process that opposing counsel must use to obtain that information.<sup>52</sup> This Note discusses each waiver separately and the procedure that must be followed when retrieving medical information from the patient's physician. Case law from other jurisdictions is relied upon in interpreting the major changes in the physician-patient privilege in Ohio, since such case law will likely provide persuasive authority for Ohio courts as they endeavor to interpret the new provisions under section 2317.02.

#### A. *Express Waivers Through Written Consent*

As early as 1880, when the physician-patient privilege was first enacted in Ohio, a patient could expressly waive his privilege.<sup>53</sup> After the 1953 amendment,<sup>54</sup> spouses, executors, or administrators could expressly waive the physician-patient privilege for the decedent. Since the scope of these express waivers is closely associated, they will be analyzed together.

A patient may voluntarily waive his statutory privilege by way of an express waiver<sup>55</sup> without violating public policy.<sup>56</sup> The waiver may even be promulgated before the patient receives any treatment.<sup>57</sup> The courts, however, will scrutinize such

49. *Id.* at § 2317.02(B)(1)(a).

50. *Id.* at § 2317.02(B)(1)(b).

51. *Id.* at § 2317.02(B)(1)(c).

52. *Id.* at § 2317.02(B)(2), (3).

53. *See supra* note 35.

54. OHIO REV. CODE ANN. § 2317.02(A) (Anderson 1954).

55. *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 383, 106 N.E. 41 (1914). An express waiver is procured either through the consent of the patient or "by the patient taking the stand and voluntarily testifying as to the . . . matters communicated to his physician." *Id.* at 383, 106 N.E. at 41. The latter is to be interpreted as an express waiver with respect to the treating physician.

56. *New York Life Ins. Co. v. Snyder*, 116 Ohio St. 693, 158 N.E. 176 (1927). The court determined that the insured could waive his privileged right to confidential medical information when applying for life insurance. "To hold otherwise would be to open wide the doors of both fraud and suicide with respect to the procuring of life insurance policies, and it would jeopardize the soundness and safety of life insurance in general." *Id.* at 702-03, 158 N.E. at 179. *See also* *Torbensen v. Family Life Ins. Co.*, 163 Cal. App. 2d 401, 329 P.2d 596 (1958); *Crest Catering Co. v. Superior Court*, 62 Cal. 2d 274, 398 P.2d 150, 42 Cal. Rptr. 110 (1965); *George v. Guarantee Mut. Life Co.*, 144 Neb. 285, 13 N.W.2d 176 (1944); *Oklahoma Protective Ass'n v. Montgomery*, 160 Okla. 135, 16 P.2d 135 (1932).

57. *Nationwide Mut. Ins. Co. v. Jackson*, 10 Ohio App. 2d 137, 140, 226 N.E.2d 760, 762 (1967). In *Jackson*, the court held that an insured could effectively waive his privilege prior to any occurrence of physical ailment. The policy read as follows:

. . . The injured person shall submit to physical examinations by physicians selected by the company when and as often as the company may reasonably require and he, or in the event of his incapacity, his legal representative, or in the event of his death his legal representative or the person or persons entitled to sue therefore, shall upon each request from the Company, execute authorization to enable the Company to obtain medical reports and copies of records.

*Id.* at 138-39, 226 N.E.2d at 761 (emphasis added by the court). Even though the patient could waive his physician-patient privilege, the waiver did not permit the insurer to conduct *ex parte* interviews. *See infra* notes 133-84 and accompanying text.



a waiver to protect the patient's interests.<sup>58</sup> The waiver may specify the applicable dates,<sup>59</sup> or it may waive certain communications while it retains the privilege for others.<sup>60</sup> Therefore, drafters of an express waiver—whether written on behalf of the patient, spouse, executor, or administrator—should proceed with caution in order to limit the waiver to only those items intended to be waived.

Public policy also allows the use of broad waivers. In *New York Life Insurance Co. v. Snyder*,<sup>61</sup> the court noted that broad waivers of the physician-patient privilege should be enforceable in order to prevent insurance fraud. The waiver in *Snyder* stated:

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.<sup>62</sup>

As indicated by *Snyder*, drafters of waivers have the right to make them as broad or as narrow as the drafters wish. In addition, a patient who signs a broad waiver while intending to waive only a narrow right can unintentionally waive more than he desires. For these reasons, a patient should carefully scrutinize any waiver before he signs.

#### B. *Compulsory Waiver Due to the Filing of an Action*

Section 2317.02(B)(1)(c) of the Ohio Revised Code recognizes a compulsory waiver of the physician-patient privilege by the filing of a claim for malpractice, wrongful death, worker's compensation, or "any other type of civil action."<sup>63</sup> Before the General Assembly's adoption of a waiver when a medical malpractice claim has been filed,<sup>64</sup> judicial recognition of such a waiver occurred in *Otto v. Miami Valley Hospital Society*.<sup>65</sup> The court applied the waiver in medical malpractice cases, even though one year earlier it had determined in *State ex rel. Lambdin v.*

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58. *Id.* at 141-42, 226 N.E.2d at 762-63.

59. *Pride v. Inter-State Bus. Men's Accid. Ass'n*, 207 Iowa 167, 216 N.W. 62 (1927) (waiving of privileged communications up to the time of examination does not constitute a waiver as to communications made to physicians after such time); *Geare v. United States Life Ins. Co.*, 66 Minn. 91, 68 N.W. 731 (1896) (waiving the right to privileged communications subsequent to the date of application does not constitute a waiver for medical treatments that occurred prior to the application date).

60. *Baker v. Industrial Comm'n*, 135 Ohio St. 491, 21 N.E.2d 593 (1939) (testifying as to the condition of the patient's leg waives the privilege concerning communications about that leg only). See also *In Re De Neef*, 42 Cal. App. 2d 691, 109 P.2d 741 (1941) (waiver of the physician-patient privilege does not extend to a waiver of privileged communications between husband and wife); *Noble v. United Benefit Life Ins. Co.*, 230 Iowa 471, 297 N.W. 881 (1941) (waiving privileged communications in an application for insurance without mentioning a testimonial waiver allows the patient to retain the testimonial privilege and thus bars the physician from revealing privileged communications in a court of law).

61. 116 Ohio St. 693, 158 N.E. 176 (1927).

62. *Id.* at 698-99, 158 N.E. at 178.

63. See *supra* note 48, at § 2317.02(B)(1)(c).

64. The 1954 version of the physician-patient privilege did not recognize a waiver when a medical malpractice case had been instituted. The medical malpractice waiver was not recognized until the decision in *Otto v. Miami Valley Hosp. Soc'y*, 26 Ohio Misc. 72, 266 N.E.2d 270 (1971). See OHIO REV. CODE ANN. § 2317.02(A) (Anderson 1954).

65. 26 Ohio Misc. 72, 266 N.E.2d 270 (1971). In making this determination, the court followed *Hartley v. Calbreath*, 127 Mo. App. 559, 106 S.W. 570 (1908).

*Brenton*<sup>66</sup> that only statutory waivers would be recognized. The *Otto* court cited *Brenton*, but held without elaboration that the *Brenton* precedent did "not approach the threshold of the question" raised in *Otto*.<sup>67</sup>

In *Otto*, the plaintiffs filed a malpractice action claiming "that behind the veil of professional secrecy and of privilege some wrong was done, and that they need not plead and they cannot be compelled to disclose to the court what wrongdoing took place."<sup>68</sup> The court, however, determined that a trial without disclosure of specific issues denied due process and offended the rationale underlying discovery, and thus held the privilege inapplicable.<sup>69</sup> The General Assembly later codified this rationale into the physician-patient privilege.<sup>70</sup>

The physician-patient privilege also recognizes that the privilege is waived when a worker's compensation action is filed,<sup>71</sup> but such was not always the case. In *State ex rel. Galloway v. Industrial Commission*,<sup>72</sup> the court determined that the Industrial Commission could not require an applicant, as a prerequisite to consideration of his claim, to sign and file a waiver. As late as 1984, the Ohio Supreme Court in *State ex rel. Holman v. Dayton Press, Inc.*<sup>73</sup> determined that the Commission could not avoid its duty to consider an applicant's claim because there was no express waiver of the physician-patient privilege.<sup>74</sup>

Since the language granting compulsory waivers when malpractice and worker's compensation claims are filed is relatively straightforward, litigation in these areas should be scarce. Applying a compulsory waiver, however, when a personal injury action is instituted may pose a greater problem for courts applying Ohio law. Indeed, the compulsory waiver of the physician-patient privilege upon the filing of a wrongful death action or "any other type of civil action" marks the most dramatic change in Ohio Revised Code section 2317.02.

Before the Tort Reform Act of 1987, Ohio did not recognize a compulsory waiver of the physician-patient privilege upon the mere filing of a personal injury action.<sup>75</sup> Although the issue had previously confronted the Ohio Supreme Court in

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66. 21 Ohio St. 2d 21, 254 N.E.2d 681 (1970).

67. *Otto*, 26 Ohio Misc. at 73, 266 N.E.2d at 271.

68. *Id.*

69. *Id.* at 75-76, 266 N.E.2d at 273. The court substantiated its decision with the following analogy: "A case without facts is without issues and is as futile of purpose as a plumber without piping or a brick mason without bricks; neither function [sic] without the wherewithal upon which they operate. Without bricks a house is not built; without issues a cause does not exist." *Id.* at 75, 266 N.E.2d at 273.

70. See *supra* note 39.

71. See *supra* note 48, at § 2317.02(B)(1)(c). Worker's compensation claims are filed under OHIO REV. CODE ANN. chapter 4123. (Anderson Supp. 1987).

72. 134 Ohio St. 496, 17 N.E.2d 918 (1938). The injured employee filed a claim with the Industrial Commission when a cleaning compound was thrown in his face during the course of his employment. The injury resulted in a loss of his vision—a permanent total disability. The Industrial Commission refused to act upon his claim until he executed a waiver for the privileged communications he had had with his treating physician. The court stated that the Industrial Commission did not have the power to promulgate rules in contradiction with the physician-patient privilege. Relief was available to the injured employee without exposing his privileged communications.

73. 11 Ohio St. 3d 66, 463 N.E.2d 1243 (1984).

74. The court stated that "[t]he commission is under a clear legal duty to consider appellee's claim without restricting his substantive rights. Where, as here, a claimant must waive the physician-patient privilege as a condition precedent to consideration of his claim, an abuse of discretion has been shown. . . ." *Id.* at 69, 463 N.E.2d at 1245.

75. See *supra* note 39.

*State ex rel. Lambdin v. Brenton*,<sup>76</sup> the court refused to adopt such a notion judicially, and instead left the legislature with the responsibility of adopting a solution. The court noted that until the legislature adopted such a change, "a personal injury litigant does not waive the physician-patient privilege merely by filing his petition, and a court seeking to compel disclosure of personal medical records exceeds its jurisdiction."<sup>77</sup> By strictly construing the physician-patient privilege and adhering only to statutory waivers, *Brenton* apparently ignored the reasoning of other jurisdictions that had judicially recognized such a waiver.<sup>78</sup>

Mandatory waiver upon the filing of a personal injury lawsuit is a principle whose time has come. As noted in *City of San Francisco v. Superior Court*:<sup>79</sup>

The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.<sup>80</sup>

Thus, if the physical condition of the patient is at issue in a case, it would be a burlesque upon logic to allow the patient to claim the privilege.<sup>81</sup> A patient should not have the right to use the figurative sword by commencing an action based on personal injuries, yet at the same time shield himself from discovery mechanisms by using the physician-patient privilege. The Ohio General Assembly has recognized the logic in this argument.

Pursuant to section 2317.02, a compulsory waiver is recognized when "any . . . type of civil action"<sup>82</sup> is filed by an injured party. This language appears to allow an extensive application.<sup>83</sup> Therefore, defining the scope of the waiver may pose problems for courts. To provide some guidance upon the limitation of this apparently boundless waiver, this Note analyzes the ways in which other jurisdictions with similar statutes have addressed this issue.<sup>84</sup>

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76. 21 Ohio St. 2d 21, 254 N.E.2d 681 (1970).

77. *Id.* at 24, 254 N.E.2d at 683.

78. The following jurisdictions have created a judicial waiver of the physician-patient privilege upon the commencement of a suit: Colorado, *Kelley v. Holmes*, 28 Colo. App. 79, 470 P.2d 590 (1970); District of Columbia, *Sklagen v. Greater Southeast Community Hosp.*, 625 F. Supp. 991 (D.D.C. 1984); Indiana, *Collins v. Bair*, 256 Ind. 230, 268 N.E.2d 95 (1971); Missouri, *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. 1968); New York, *Mancinelli v. Texas E. Transmission Corp.*, 34 A.D.2d 535, 308 N.Y.S.2d 882 (1970); Vermont, *Mattison v. Poulen*, 134 Vt. 158, 353 A.2d 327 (1976).

Alaska had previously adopted the waiver through judicial innovation in *Mathis v. Hilderbrand*, 416 P.2d 8 (Alaska 1966), but the waiver is now codified under ALASKA R. EVID. 504(d)(1).

79. 37 Cal. 2d 227, 231 P.2d 26 (1951).

80. *Id.* at 232, 231 P.2d at 28.

81. WIGMORE, *supra* note 7, § 2389, at 855-61. Professor Wigmore stated that:

By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "I tender witnesses A, B and C, who will openly prove the severe nature of my injury. But I object to the testimony of witness D, a physician called by the opponent to prove that my injury is not so severe as I claim, because it is extremely repugnant to me that my neighbors should learn the nature of my injury!" *Id.* at 855.

82. See *supra* note 48, at § 2317.02(B)(1)(c).

83. See *supra* note 45.

84. For jurisdictions that have judicially adopted the compulsory waiver, see *supra* note 78.

The following jurisdictions have codified the compulsory waiver: Alabama, ALA. CODE § 15-23-11(a) (Supp. 1987) (although Alabama does not recognize the physician-patient privilege, *Arthers v. State*, 459 So. 2d 972 (1984), it has

Jurisdictions that have enacted statutes waiving the physician-patient privilege when a personal injury action is commenced have recognized the waiver when the health of the plaintiff is placed at issue.<sup>85</sup> Clearly, when a plaintiff files a medical malpractice, worker's compensation, wrongful death, or other type of civil action seeking damages for the physical injury caused by another, the plaintiff effectively places his health at issue.<sup>86</sup> A typical case exemplifying this proposition is *Galindo v. Riddell, Inc.*,<sup>87</sup> in which the plaintiff sought recovery for personal injuries he allegedly suffered while wearing a defective football helmet. Since the plaintiff placed his physical condition at issue by filing the action, the plaintiff's physician was permitted to testify despite the plaintiff's objections. The court held that the plaintiff's physician-patient privilege had been waived by commencement of the action. Thus, one would expect that section 2317.02 would also waive the privilege when a plaintiff places his health at issue in a lawsuit.<sup>88</sup>

Most states,<sup>89</sup> however, apply the compulsory waiver when the patient places his *physical condition at issue*. This differs semantically from Ohio where the compulsory waiver is instituted when an *action is filed by the patient*.<sup>90</sup> Even though the language in the various state statutes may differ,<sup>91</sup> the effect should be the same: When the physical condition of a plaintiff is at issue in a case, the physician-patient privilege should be waived when the communication relates to the ailment at issue. Since a plaintiff chooses to file a lawsuit, he voluntarily places his physical condition

statutorily recognized a waiver when a claim is filed by a victim of crime); Alaska, ALASKA R. EVID. 504(d)(1); Arkansas, ARK. R. EVID. 503(d)(3); California, CAL. EVID. CODE § 996 (West 1966); Delaware, DEL. UNIF. R. EVID. 503(d)(3); Georgia, GA. CODE ANN. § 24-9-40 (Supp. 1988); Hawaii, HAW. R. EVID. 504(d)(3) (1985); Idaho, IDAHO CODE § 9-203.4(C) (1979 & Supp. 1988); Illinois, ILL. ANN. STAT. ch. 110, para. 8-802(4) (Smith-Hurd Supp. 1988); Iowa, IOWA CODE ANN. § 622.10 (West Supp. 1988); Kansas, KAN. STAT. ANN. § 60-427(d) (1983); Maine, ME. R. EVID. 503(e)(3); Michigan, MICH. COMP. LAWS ANN. § 600.2157 (West 1986); Minnesota, MINN. STAT. ANN. § 595.02(5) (West 1988); Mississippi, MISS. CODE ANN. § 13-1-21 (Supp. 1987); Nebraska, NEB. REV. STAT. § 27-504(4)(c) (1985); Nevada, NEV. REV. STAT. ANN. § 49.245(3) (1986 & Supp. 1988); New Jersey, N.J. STAT. ANN. § 2A:84A-22.4 (West 1976); North Dakota, N.D. R. EVID. 503(d)(3); Ohio, OHIO REV. CODE ANN. § 2317.02(B)(1)(c) (Anderson Supp. 1987); Oklahoma, OKLA. STAT. ANN. tit. 12, § 2503(D)(3) (West Supp. 1988); South Dakota, S.D. CODIFIED LAWS § 19-13-11 (Michie 1987); Texas, TEX. REV. CIV. STAT. ANN. art. 4495b, § 5.08(g)(4) (Vernon Supp. 1988); Virginia, VA. CODE ANN. § 8.01-399 (1984); Washington, WASH. REV. CODE ANN. § 5.60.060(4)(b) (Supp. 1988); Wisconsin, WIS. STAT. ANN. § 905.04(4)(c) (West Supp. 1987).

85. See *City of San Francisco v. Superior Court*, 37 Cal. 2d 227, 231 P.2d 26 (1951); *Green v. Superior Court*, 220 Cal. App. 2d 121, 33 Cal. Rptr. 604 (1963); *Galindo v. Riddell, Inc.*, 107 Ill. App. 3d 139, 437 N.E.2d 376 (1982); *Werner v. Kliever*, 238 Kan. 289, 710 P.2d 1250 (1985); *Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333 (1976); *Hoffmeyer v. Pell*, 23 Pa. D. & C.3d 448 (1982); *City of Portsmouth v. Cilumbrello*, 204 Va. 11, 129 S.E.2d 31 (1963).

86. See *supra* note 81 and accompanying text.

87. 107 Ill. App. 3d 139, 437 N.E.2d 376 (1982).

88. This would indeed promote the efficient operation of our judicial system. If the patient were permitted to withhold his communications with his treating physician, then defense counsel would not be able to obtain the plaintiff's medical information necessary for his case. Defense counsel, under the immediate predecessor to § 2317.02, had to wait until the patient voluntarily revealed the privileged communications. At this juncture, defense counsel would have to request a recess to examine the newly acquired information. This is not an efficient use of the court's time. See also Rice, *Physician-Patient Privilege - A Significant Problem for Counsel?*, 20 OHIO A. CIV. TRIAL ATTY'S, Spring 1985, at 2.

89. See, e.g., ALA. CODE § 15-23-11(a) (Supp. 1987); CAL. EVID. CODE § 996 (West 1966); DEL. UNIF. R. EVID. 503(D)(3) (1987); GA. CODE ANN. § 24-9-40 (Supp. 1988); HAW. R. EVID. 504(d)(3) (1985); IOWA CODE ANN. § 622.10 (West Supp. 1988); KAN. STAT. ANN. § 60-427(d) (1983); NEB. REV. STAT. § 27-504(4)(c) (1985); NEV. REV. STAT. ANN. § 49.245(B) (1986 & Supp. 1988); N.D. R. EVID. 503(d)(3); S.D. CODIFIED LAWS § 19-13-11 (Michie 1987); and WIS. STAT. ANN. § 905.04(4)(c) (West Supp. 1987).

90. See *supra* note 48.

91. See *supra* note 89.

at issue. Thus, when the waiver is being applied to a plaintiff, "filing" should be equivalent to "placing at issue" since the act of filing a lawsuit effectively places the plaintiff's condition at issue in the case.

States applying a waiver when the plaintiff places his own condition at issue in the suit have debated, however, on whether the waiver also applies to a defendant. The question thus becomes whether a defendant will be held to a compulsory waiver of the privilege even though he did not initiate the action. The court in *Branch v. Wilkinson*<sup>92</sup> held that a party does not place his physical condition at issue in a suit when he "merely denies allegations by the opposing party concerning his condition."<sup>93</sup> In *Branch*, the defendant was charged with being intoxicated while driving his automobile. The plaintiff, knowing that a blood sample had been taken from the defendant, asserted that the defendant was driving under the influence of alcohol. The defendant did not want the results of the blood sample made public, so he claimed the physician-patient privilege and denied the allegations. The court determined that if a denial placed the defendant's physical condition at issue, "the defendant would be placed in the position of either admitting plaintiff's allegations of intoxication, or else foregoing the privilege. We do not believe that the physician-litigant exception was intended to work such a result."<sup>94</sup> Thus, following *Branch*, a mere denial of the plaintiff's allegations may not be equivalent to placing a defendant's physical condition at issue in a suit.

The decision in *Branch*, however, appears to contradict the theory underlying the physician-patient privilege. Once a patient has referred to communications with his physician, it would be absurd to continue to permit that patient to claim the physician-patient privilege.<sup>95</sup> Even though this author believes that the purpose of the privilege is no longer justified when the physical condition of *any patient* is placed at issue before the court—whether it be through a claim or defense—a strict construction of section 2317.02 may lead to the opposite conclusion.

In *State v. Tu*,<sup>96</sup> an Ohio court held that a denial by a defendant places the defendant's physical condition at issue and automatically waives the physician-patient privilege. The defendant in *Tu* was charged with both driving while intoxicated and vehicular homicide. While the defendant was being examined at a hospital, a blood sample was taken. In an attempt to exclude the test results from evidence, the defendant asserted his physician-patient privilege. The court held that "[i]n the context of a criminal prosecution for driving while intoxicated . . . [b]y tendering a plea of 'not guilty' to the offense charged, [the defendant] thereby placed in issue each essential element, including (obviously) the element requiring proof of his intoxication."<sup>97</sup> The court continued:

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92. 198 Neb. 649, 256 N.W.2d 307 (1977).

93. *Id.* at 662, 256 N.W.2d at 315. See also *Koump v. Smith*, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969). The court in *Koump* determined that the mere denial of an allegation does not waive the physician-patient privilege.

94. *Branch*, 198 Neb. at 662, 256 N.W.2d at 315.

95. See *supra* note 81 and accompanying text.

96. 17 Ohio App. 3d 159, 478 N.E.2d 830 (1984).

97. *Id.* at 163, 478 N.E.2d at 834.

[The defendant's] plea of "not guilty" put his *physical condition* in issue. Yet, in asserting his physical condition as an element of the crime, an element to be proven beyond a reasonable doubt, [the defendant] is simultaneously seeking to invoke an evidentiary privilege to preclude the prosecution from establishing precisely that element. This is patently unfair to a party [the prosecution] already bearing extremely heavy burdens of proof and persuasion. . . . [E]vidence of the defendant's blood-alcohol test, if otherwise competent, is exceedingly relevant—indeed, vitally necessary—to proof of guilt. To allow the privilege to suppress that evidence would be to thwart the state's ability to offer *the best evidence* of guilt; it would, moreover, permit a defendant to evade the penalties therefor with impunity.<sup>98</sup>

Although the issues in *Tu* concerned the privilege in the criminal context,<sup>99</sup> the same theory may be used to justify a waiver whenever a defendant's physical condition is placed at issue in a civil suit. Once the defendant's physical condition is placed at issue, justice will not prevail if the defendant is permitted to claim the privilege. The defendant's physical condition may be an extremely relevant issue, especially if he is asked to confirm or deny aspects of that condition.

Due to the express language of section 2317.02, however, it appears that a defendant in a suit cannot "file" a claim or action by merely denying an allegation asserted by the plaintiff or the prosecution.<sup>100</sup> This contemporary interpretation of section 2317.02 differs from the result reached in *Tu*. In an attempt to justify the General Assembly's apparent limitation of the compulsory waiver for a defendant, one could argue that when a plaintiff "files" a claim or action, he does so upon his own initiative. Therefore, he is voluntarily placing his physical condition at issue in the case. Alternatively, the defendant sits in a defensive posture and must respond to the allegations or lose the pleading. The General Assembly may have placed great weight upon the fact that the defendant is not a party of his own free will and thus should not be forced to abandon his physician-patient privilege due to accusations made by the plaintiff. By requiring "filing" as opposed to merely placing the patient's condition at issue before instituting a compulsory waiver, it appears that the Ohio General Assembly has protected a defendant's medical communications when a defendant denies the plaintiff's allegations.<sup>101</sup>

Additional credence for strictly construing section 2317.02 may be established when the goal is to prevent the plaintiff from improperly using the courts to obtain privileged medical information. Without such protection, a plaintiff could file an action with little or no basis and force the defendant to waive the privilege when he denies the complaint.

However, if the physical condition of the defendant is affirmatively raised by "filing" a complaint or defense against the plaintiff, the defendant should be deemed

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98. *Id.* (emphasis in original).

99. Distinguishing between procedural safeguards in the civil and criminal context is beyond the scope of this Note. The reader is cautioned to consult resources dealing with the acquisition and use of evidence in the criminal setting in order to fully appreciate the differences in both areas.

However, it should be noted that § 2317.02 specifically states that filing any type of *civil* action waives the privilege. See *supra* note 48.

100. See *supra* note 48.

101. *Id.*

to have waived the privilege since he has placed his condition at issue in the suit.<sup>102</sup> Although section 2317.02(B)(1)(c) waives the physician-patient privilege only upon the "filing" of a lawsuit instead of merely placing the patient's physical condition at issue, a defendant can "file" an action without being a plaintiff. Therefore, it is believed that section 2317.02 will be applicable to defendants as well as plaintiffs only under limited circumstances. For example, when a defendant submits a counterclaim,<sup>103</sup> he should be deemed to have "filed" a claim and thus have placed at issue his own physical condition.<sup>104</sup> Since counterclaims are affirmative pleadings required to be filed with the court, they should fall under the auspices of section 2317.02. Thus, a party to a personal injury suit should be able to obtain a defendant's medical communications when the defendant files a claim that places his medical condition in issue.

It is further believed that the compulsory waiver of the physician-patient privilege does not apply to witnesses. Witnesses cannot "file" causes of action in a legal proceeding as required by section 2317.02.<sup>105</sup> Even jurisdictions, such as California, that allow the waiver when the patient places his physical condition "at issue" have determined that the patient-litigant exception to the privilege does not apply to witnesses.<sup>106</sup>

The final issue that must be resolved is the extent to which the compulsory waiver is applicable when a claim is filed under section 2317.02. Should the scope

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102. A defendant who does not *file* an action as required by OHIO REV. CODE ANN. § 2317.02 does not waive the physician-patient privilege. *See supra* note 48. An affirmative action must be performed by the defendant to waive the privilege. For examples of how a defendant can affirmatively waive the privilege by *filing* a cause of action, *see infra* note 104.

103. FED. R. CIV. P. 13; OHIO R. CIV. P. 13.

104. If the defendant has a claim against the plaintiff in the action, he may assert a counterclaim against the plaintiff. FED. R. CIV. P. 13; OHIO R. CIV. P. 13. This encourages all disputes between the parties to be resolved in one action to promote judicial efficiency. Since the process of entering a counterclaim is equivalent to the process for a complaint, placing the plaintiff in a defensive posture, then the *filing* of a counterclaim shall waive the physician-patient testimonial privilege. *See supra* note 48.

The same holds true when a cross-claim is filed by one defendant against another defendant, or by one plaintiff against another plaintiff. Federal civil rule 13(g) and Ohio civil rule 13(G) ". . . permit, but [they do] not . . . compel, co-parties to assert against one another claims that bear certain prescribed relations to the rest of the controversy. . . ." R. FIELD, B. KAPLAN, AND D. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 464-65 (5th ed. 1984). Again, since cross-claims are affirmative assertions against other parties, they should be deemed to have been *filed* as required by OHIO REV. CODE ANN. § 2317.02. *See supra* note 48.

105. A witness is not classified as a *party* required by both federal and Ohio civil rule 7 to file a complaint, nor is a witness a *party* who may file a counterclaim. FED. R. CIV. P. 13; OHIO R. CIV. P. 13. A *party* is a litigant in an action who is either asserting or defending a claim. Alternatively, a witness is merely one who testifies to what he has seen, heard, or otherwise observed. *Wigginton v. Order of United Commercial Travelers of America*, 126 F.2d 659, 666 (C.C.A. Ind.), *cert. denied*, 317 U.S. 636 (1942).

106. *Jones v. Superior Court*, 119 Cal. App. 3d 534, 546, 174 Cal. Rptr. 148, 155 (1981). In *Jones*, a woman brought an action against various drug companies who manufactured a drug that the plaintiff's mother had taken while pregnant with the plaintiff. The court noted that although the mother was closely allied with the plaintiff in the lawsuit (since the alleged injury took place while the mother was pregnant with the plaintiff), the mother's physician-patient privilege was not automatically waived since the mother was a witness who was not a party to the proceeding. However, the witness did voluntarily testify that she ingested the drug and the circumstances surrounding the need for such a drug. The court determined that, since she disclosed a significant portion of her communication with her physician without coercion, the privilege had been waived only concerning those disclosed communications. CAL. EVID. CODE § 912 (West 1966 & Supp. 1988).

Under the current physician-patient privilege in Ohio, *see supra* note 48, even if the witness did voluntarily testify as to her communications with her physician, since she was a witness and did not *file* a cause of action, the physician-patient privilege would still protect the mother. *See infra* notes 185-202 and accompanying text.

of the waiver be limited or expansive? If opposing counsel were entitled to unlimited discovery, patients might be deterred from filing personal-injury suits. They would be afraid of opening up all past physician-oriented communications. This "would clearly be an intolerable and overbroad intrusion into the patient's privacy, not sufficiently limited to the legitimate state interest embodied in the provision, and would create opportunities for harassment and blackmail."<sup>107</sup> Not everyone, however, believes that expansive discovery would facilitate the dissemination of relevant medical information. In fact, many commentators believe that fear of disclosing irrelevant medical history has not deterred any claimant from resorting to litigation.<sup>108</sup>

Support for expansive discovery rests upon the theory that plaintiffs should not be allowed unbridled discretion in determining the relevancy of their own medical information. If plaintiffs were permitted to determine what medical information was relevant, they would "serve as their own medical experts, picking and choosing between various injuries and diseases and deciding for themselves which are, or are not, relevant to the injuries which they presently claim."<sup>109</sup> Injuries that appear to be irrelevant to a plaintiff may be extremely relevant to a medical expert. Thus, expansive discovery would eliminate the confusion concerning the relevancy of a prior injury. If a defendant clearly caused a plaintiff's injuries, the plaintiff's prior medical records would confirm his theory.<sup>110</sup> The plaintiff should have nothing to hide.

Most courts, however, hold that commencing an action waives the physician-patient privilege for the specific injury from which the dispute arises. Unlimited release of lifetime medical information is an overbroad intrusion.<sup>111</sup> The patient-litigant exception to the privilege acts not as a complete waiver, but rather "only as a limited waiver concomitant with the purposes of the exception."<sup>112</sup> The permissible scope of inquiry must be limited to the nature and extent of physical injury that the litigant has made an issue in the case.<sup>113</sup> Litigants should not be compelled to sacrifice their privacy rights to recover for a physical injury.<sup>114</sup>

Ohio may well follow the view that the compulsory waiver will only attach to the specific area in which injury is alleged. The Ohio Supreme Court, in *Baker v. Industrial Commission*,<sup>115</sup> determined that the assertion of an injury claim only waives medical information for the specific area of injury. The court stated:

To declare that all diseases of the patient prior to such injury or disease could be shown would be to contend also that where a client had testified in respect to his attorney in one

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107. *In re Lifschutz*, 2 Cal. 3d 415, 435, 467 P.2d 557, 570, 85 Cal. Rptr. 829, 842 (1970).

108. *Hallendorf v. Superior Court*, 85 Cal. App. 3d 553, 559, 149 Cal. Rptr. 564, 568 (1978) (Kane, J., dissenting); WIGMORE, *supra* note 7, § 2380a, at 829.

109. *Britt v. Superior Court*, 20 Cal. 3d 844, 876, 574 P.2d 766, 787, 143 Cal. Rptr. 695, 716 (1978) (Richardson, J., dissenting).

110. *Hallendorf*, 85 Cal. App. 3d at 560, 149 Cal. Rptr. at 569 (Kane, J., dissenting).

111. *Id.* at 557, 149 Cal. Rptr. at 566.

112. *Britt*, 20 Cal. 3d at 863, 574 P.2d at 779, 143 Cal. Rptr. at 707.

113. *Brown v. Gutter*, 256 Iowa 671, 128 N.W.2d 896 (1964); *DeLuca v. Leon*, 1 Pa. D. & C.3d 185 (1977).

114. *See In re Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

115. 135 Ohio St. 491, 21 N.E.2d 593 (1939).



particular lawsuit, his attorney could thereby under the statute testify not only in respect to that particular lawsuit but also in respect to any and all other litigation which the attorney might have conducted for the client. . . . There are different diseases and subjects in the realm of medicine just as there are different subjects and lawsuits in the realm of law.<sup>116</sup>

Therefore, if a litigant commences a personal injury action alleging injuries to a specific area of his anatomy, it follows that all medical information pertaining to that specific area should be waived. By claiming injury to the right elbow, one waives his statutory privilege to all medical information relating to the right elbow while keeping confidential all medical information pertaining to the left elbow. Requiring a limited compulsory waiver enables the patient to protect irrelevant medical information while affording opposing counsel access to communications essential to his case.

### C. What Information May Be Obtained Through a Waiver?

Section 2317.02 attempts to define "communication" broadly when the physician-patient privilege has been statutorily waived. "[C]ommunication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician to diagnose, treat, prescribe, or act for a patient."<sup>117</sup> Before the adoption of this definition by the legislature, courts were charged with defining what constituted "communications."<sup>118</sup> While this statutory definition basically codifies prior case law, some analysis is needed to determine its scope.

The privilege in Ohio attaches to all communications made in the physician-patient relationship.<sup>119</sup> It applies, however, only to communications made to a physician who had a relationship to the examination, diagnosis, or treatment of the patient's condition for which the physician-patient relationship was established.<sup>120</sup> Thus, the privilege attaches to the physician-patient relationship during any consultation with the view to curative treatment.<sup>121</sup> Further, the information obtained by the treating physician must be essential to enable the physician to perform his duties properly. The privilege, however, does not protect the knowledge or the existence of the relationship; it only protects the interchange within the relationship.<sup>122</sup>

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116. *Id.* at 494-95, 21 N.E.2d at 595.

117. *See supra* note 48, at § 2317.02(B)(3).

118. *See supra* note 39. Since the statute did not explicitly define the meaning of "communication," courts took up the task of defining the term as it pertained to various circumstances. *See, e.g.,* Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947); State v. Dress, 10 Ohio App. 3d 258, 461 N.E.2d 1312 (1982); Vincenzo v. Newhart, 7 Ohio App. 2d 97, 219 N.E.2d 212 (1966), *aff'd*, 11 Ohio St. 2d 63 (1967); Ramey v. Mets, 3 Ohio App. 2d 329, 210 N.E.2d 449 (1964); Black v. Port, Inc., 120 Ohio App. 369, 202 N.E.2d 638 (1963); *In re Roberto*, 106 Ohio App. 303, 151 N.E.2d 37 (1958); *In re Loewenthal*, 101 Ohio App. 355, 134 N.E.2d 158 (1956); York v. Roberts, 9 Ohio Misc. 2d 19, 460 N.E.2d 326 (1983).

119. Rice, *Physician-Patient Privilege - A Significant Problem for Counsel?*, 20 OHIO A. CIV. TRIAL ATT'YS, Spring 1985, at 2.

120. Meier v. Peirano, 76 Ohio App. 9, 62 N.E.2d 920 (1945).

121. WIGMORE, *supra* note 7, § 2382, at 835.

122. Willig v. Prudential Ins. Co., 71 Ohio App. 255, 256, 49 N.E.2d 421, 422 (1942). The court permitted the two physicians who treated the patient to testify that the relation of physician and patient existed. "Until the relation is disclosed, there is no privilege to be protected. . . . The court must find that the confidential relationship existed before it would be justified in ruling that the physician could not testify. . . ." *Id.* at 257, 49 N.E.2d at 422.

Communications between the patient and the treating physician can be oral, written, or the physical exhibition of the body for examination and treatment.<sup>123</sup> As addressed in section 2317.02(B)(3), any information concerning the patient's physical condition that is transcribed in "any medical, office, or hospital communication such as a record, chart, letter, memorandum, laboratory test and results, x-ray, photograph, financial statement, diagnosis, or prognosis"<sup>124</sup> is a privileged communication.

Since "communications" between a physician and his patient are protected, many have questioned whether the treating physician may be called as a witness for the defense. Since neither party may obtain preferential status for any witness, the treating physician may serve as a witness for the defense, but he is prevented from testifying as to any privileged "communications."<sup>125</sup> The physician may be asked hypothetical questions,<sup>126</sup> but, because of the possibility of intruding into the patient's protected medical history, the trial court must exercise broad discretion to ensure that the physician's testimony remains within acceptable parameters.<sup>127</sup>

When two or more physicians have separate, independent responsibilities, each physician's communications must be waived individually.<sup>128</sup> Thus, a written report submitted by a specialist will not be deemed a communication to the nonspecialist treating physician since such a report is made outside the physician-patient relationship.<sup>129</sup> Communications by other physicians in the possession of the treating physician, however, may be disclosed only when the consulting physicians are

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123. *Baker v. Industrial Comm'n*, 135 Ohio St. 491, 496, 21 N.E.2d 593, 596 (1939).

124. See *supra* note 48, at § 2317.02(B)(3).

125. *Strizak v. Industrial Comm'n*, 159 Ohio St. 475, 479, 112 N.E.2d 537, 539 (1953). The court held that a treating physician is not precluded from responding to hypothetical questions asked by the defense, provided that the treating physician disregards any facts or communications he learned while attending the plaintiff. As long as the treating physician answers the questions hypothetically, no privileged communications would be revealed in his testimony. See also *Vincenzo v. Newhart*, 7 Ohio App. 2d 97, 101, 219 N.E.2d 212, 215 (1966). In *Vincenzo*, the court held that it would be an abuse of the trial court's discretion to refuse to allow a treating physician subpoenaed by the defense to take the stand and testify to matters not subject to the physician-patient privilege. See also *Moore v. Grandview Hosp.*, 25 Ohio St. 3d 194, 495 N.E.2d 934 (1986).

126. *Vincenzo*, 7 Ohio App. 2d at 102, 219 N.E.2d at 215.

127. The court in *Vincenzo* stated that:

One can conceive of many competent questions which could be propounded to an attending physician, which would fall outside the limitation relative to communication and advice covered by the statute. . . . Broad discretion is vested in the trial court to guard against unfair innuendoes which might arise as a result of trial strategy. . . . But to preclude an otherwise competent witness from even taking the stand because of the fear of such eventuality is clearly an abuse of discretion and gives far more latitude to the statute than was the legislative intent.

*Id.* at 102, 219 N.E.2d at 215-16.

128. *Moore v. Grandview Hosp.*, 25 Ohio St. 3d 194, 495 N.E.2d 934 (1986). The court determined that the plaintiff had two physicians who treated the plaintiff at two separate and distinct times. Distinctions were drawn between *Moore* and *Conti v. Lynn*, Franklin App. No. 75AP-591 (May 20, 1976), in which two physicians jointly treated the patient. It appears that the Ohio Supreme Court would favor a waiver of the physician-patient privilege for all physicians who jointly treat a patient when the privilege has been waived for only one physician. However, when one physician obtains records from another physician who had previously treated the patient (as was the case in *Moore*), only communications made while currently treating the patient may be waived.

129. *In re Roberto*, 106 Ohio App. 303, 310, 151 N.E.2d 37, 41 (1958). Reports obtained from other physicians, whether oral or written, in the hands of the treating physician are mere hearsay. "[T]herefore, such evidence in his hands is incompetent and there is no obligation upon him to disclose the contents thereof." *Id.*

engaged in a uniform course of treatment.<sup>130</sup> Therefore, if two or more physicians simultaneously treat a patient, the communications conveyed may be disclosed without separate waivers. One physician may disclose communications made by other treating physicians if the other physicians' communications were made while jointly treating the patient.

Likewise, since a treating physician of a prior injury is not engaged in a uniform course of treatment with a subsequent injury, the mere mention of a previous operation to the subsequent physician should not waive the privilege with respect to information concerning the previous operation.<sup>131</sup> Further, to treat a patient adequately, the physician will usually seek and review the patient's physical history. Although one may assert that "communications" should be given a broad interpretation, encompassing the prior medical history of the plaintiff in the possession of the current treating physician, the author does not believe that courts should read the definition this broadly. As noted earlier, prior medical history, although conveyed within the physician-patient relationship, is not disseminated as an essential element of the treating process. Prior medical history is helpful to a treating physician, but, if the physician was not involved in the diagnosis and treatment of the prior injury, he should not disclose information pertaining to the prior injury unless a waiver is established for the physician who treated the prior injury. Thus, all medical information should be revealed by the physician who treated the patient for the particular injury. Medical information should not be disclosed through a roundabout manner by physicians who did not "diagnose, treat, prescribe, or act for the patient."<sup>132</sup>

#### D. *Procedures That Must Be Followed to Obtain Unprivileged Information*

Although authorizations for release of medical information are routinely provided upon the request of defense counsel,<sup>133</sup> some courts are not convinced that this practice is commonplace.<sup>134</sup> Thus, discovery procedures that outline the process for the retrieval of information from the patient's physician must be established, defined, and followed. An area of great concern for most jurisdictions is whether a physician may be informally contacted and interrogated outside the presence of the patient's counsel.

Many arguments can be enumerated that support *ex parte* conferences between opposing counsel and a patient's physician. Courts favoring *ex parte* conferences have stressed that (1) public policy considerations favor free access to all relevant information in a suit;<sup>135</sup> (2) by denying the use of *ex parte* conferences, defense

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130. See *Barnard v. Cedar Rapids City Cab Co.*, 257 Iowa 734, 133 N.W.2d 884 (1965); *Brown v. Guiter*, 256 Iowa 671, 128 N.W.2d 896 (1964); *Moore v. Grandview Hosp.*, 25 Ohio St. 3d 194, 495 N.E.2d 934 (1986).

131. See *Barnard*, 257 Iowa 734, 133 N.W.2d 884. By mentioning a previous operation to the treating physician, the plaintiff did not waive her physician-patient privilege when she called the treating physician to the stand to testify. *Id.* at 751, 133 N.W.2d at 895.

132. See *supra* note 48, at § 2317.02(B)(3).

133. *Green v. Bloodsworth*, 501 A.2d 1257, 1260 (Del. Super. Ct. 1985).

134. *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 358 (Iowa 1986).

135. *Green*, 501 A.2d at 1258.

counsel must resort to the use of depositions, which increases the cost of the litigation and creates logistical problems;<sup>136</sup> (3) the physician-patient privilege should not be used to suppress the truth concerning the patient's injuries;<sup>137</sup> (4) *ex parte* conferences help to eliminate the need and expense of calling the treating physician as a witness in a trial or for a deposition when the physician's testimony will not benefit the defense;<sup>138</sup> (5) if the patient's attorney is required to be present at all times when the patient is being questioned, the patient's attorney will be able to monitor his adversary's progress, while no scrutiny is placed on the patient's counsel;<sup>139</sup> (6) no proprietary right exists for any person's testimony;<sup>140</sup> (7) informal interviews permit early evaluation and settlement of cases;<sup>141</sup> (8) courts may issue protective orders limiting the scope of production and dissemination of information in *ex parte* conferences;<sup>142</sup> (9) *ex parte* conferences are not barred by the rules of civil procedure;<sup>143</sup> (10) the treating physician's information should be equally accessible to both sides;<sup>144</sup> and (11) denying *ex parte* conferences impedes the broad goals of discovery.<sup>145</sup> While these considerations are important factors, the Ohio General Assembly has apparently prohibited *ex parte* examinations by limiting the discovery mechanisms available to opposing counsel to those defined under the rules of civil procedure.<sup>146</sup>

Although it may be difficult to determine the General Assembly's motive in restricting the retrieval of information to those procedures defined in the rules of civil procedure, many persuasive factors support such a determination. To begin with, most patients recognize that a confidential and fiduciary relationship exists between themselves and their physician.<sup>147</sup> Ever since the fifth century B.C., the Hippocratic Oath<sup>148</sup> has governed the ethics of the medical profession, rooting the confidentiality

136. *Doe v. Eli Lilly & Co.*, 99 F.R.D. 126, 128 (D.D.C. 1983); *State ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882, 888 (Mo. Ct. App. 1985).

137. *State v. Carter*, 641 S.W.2d 54, 59 (Mo. 1982), *cert. denied*, 461 U.S. 932 (1983).

138. *Doe*, 99 F.R.D. at 128; *Stempler v. Speidell*, 100 N.J. 368, 495 A.2d 857 (1985); *Lazorick v. Brown*, 195 N.J. Super. 444, 455, 480 A.2d 223, 229 (1984).

139. *Doe*, 99 F.R.D. at 128.

140. *Id.*

141. *Trans-World Inv. v. Drobny*, 554 P.2d 1148, 1152 (Alaska 1976).

142. *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 602 (Mo. 1968).

143. *Doe*, 99 F.R.D. at 128; *Green v. Bloodsworth*, 501 A.2d 1257, 1258 (Del. 1985); *Stempler v. Speidell*, 100 N.J. 368, 382, 495 A.2d 857, 864-65 (1985); *Lazorick v. Brown*, 195 N.J. Super. 444, 454-55, 480 A.2d 223, 228 (1984).

144. *Doe*, 99 F.R.D. at 128; *Green*, 501 A.2d at 1259; *Lazorick*, 195 N.J. Super. at 456, 480 A.2d at 230.

145. *Green*, 501 A.2d at 1258; *Stempler*, 100 N.J. at 381-82, 495 A.2d at 863; *Lazorick*, 195 N.J. Super. at 455, 480 A.2d at 229.

146. *See supra* note 48, at § 2317.02(B)(2).

147. *Alston v. Greater Southeast Community Hosp.*, 107 F.R.D. 35, 37 (D.D.C. 1985).

148. The Hippocratic Oath states: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of man, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about." EDELSTEIN, THE HIPPOCRATIC OATH, TEXT, TRANSLATION AND INTERPRETATION 3 (1945).

Hippocrates (circa 400 B.C.) is known as the "Father of Medicine." He was perhaps the first to express a physician's ethical duty to his patient. Due to the primitive methods of recordation during Hippocrates' era, one may find slight variations in the Hippocratic Oath. *See, e.g., DeWitt, Privileged Communications between Physician and Patient*, 10 W. RES. L. REV. 488 (1959).

Due to the existence of the Hippocratic Oath, one can safely state that physicians for several hundred years have acknowledged their obligation of keeping in trust a patient's confidences.

of the physician-patient privilege deep in history and tradition. As the court in *Hammonds v. Aetna Casualty & Surety Co.*<sup>149</sup> indicated, “[a]lmost every member of the public is aware of the promise of discretion contained in the Hippocratic Oath, and every patient has a right to rely upon this warranty of silence.”<sup>150</sup>

The American Medical Association’s (AMA) Principles of Medical Ethics further obligates the physician to act honestly and confidentially.<sup>151</sup> Principle II indicates that “a physician shall deal honestly with his patients and colleagues . . .,” and Principle IV states that “[a] physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of law.”<sup>152</sup>

The final source defining the ethics of the medical profession may be found in the Current Opinions of the Judicial Council of the American Medical Association.<sup>153</sup> Canon 5.05 of the Current Opinions states that “[t]he information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. . . . The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.”<sup>154</sup>

Due to the medical profession’s oath of secrecy,<sup>155</sup> the pledge to safeguard patient’s confidences,<sup>156</sup> and the concern to keep physician-patient communications confidential to the greatest degree possible,<sup>157</sup> a patient has a right to rely on the physician’s faithful execution of these ethical obligations.<sup>158</sup>

Further, a fiduciary relationship based upon trust and confidence exists between a patient and his treating physician.<sup>159</sup> *Hammonds* underscored the fiduciary

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149. 243 F. Supp. 793 (N.D. Ohio 1965).

150. *Id.* at 801.

151. PRINCIPLES OF MEDICAL ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (1937). The principles of medical ethics generally express the duty of a physician to his patients, the profession, and the public. “[I]t is incumbent on the physician that under all conditions, his bearing toward patients, the public and fellow practitioners should be characterized by a gentlemanly deportment and that he constantly should behave toward others as he desires them to deal with him.” *Id.* at 24.

152. *Id.* at 4.

153. CURRENT OPINIONS OF THE JUDICIAL COUNSEL OF THE AMERICAN MEDICAL ASSOCIATION (1984).

154. The full text of Canon 5.05 states:

The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential communications or information without the express consent of the patient, unless required to do so by law.

The obligation to safeguard patient confidences is subject to certain exceptions which are ethically and legally justified because of overriding social considerations. Where a patient threatens to inflict serious bodily harm to another person and there is a reasonable probability that the patient may carry out the threat, the physician should take reasonable precautions for the protection of the intended victim, including notification of law enforcement authorities. Also, communicable diseases, gun shot and knife wounds, should be reported as required by applicable statutes or ordinances.

*Id.* at 19.

155. See *supra* note 148.

156. See *supra* note 151.

157. See *supra* note 153.

158. *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 592, 499 N.E.2d 952, 959 (1986), *cert. denied*, 107 S. Ct. 3232 (1987).

159. *Estate of Leach v. Shapiro*, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984).

relationship between physician and patient: "[T]he patient necessarily reposes a great deal of trust not only in the skill of the physician but in his discretion as well. The introduction in this relationship of the aura of trust, and the expectation of confidentiality that results therefrom, imposes the fiduciary obligations upon the doctor."<sup>160</sup> In Ohio, breach of the physician's fiduciary obligation of secrecy and undivided loyalty entitles the patient to legal recourse,<sup>161</sup> either for the breach of a patient's right to privacy or for professional discipline due to the physician's unprofessional conduct.<sup>162</sup> By prohibiting *ex parte* conferences, the occasion for a treating physician to breach his fiduciary obligation will be minimized.

Physicians are not trained in the intricate operations of the law and a tremendous burden would be placed upon the shoulders of medical professionals if informal conferences were permissible. An improper determination by a treating physician would expose the physician to liability even though the physician did not intend to reveal confidential communications.<sup>163</sup> Physicians may also be led to reveal confidential information due to high pressure tactics by over-zealous advocates. It is not beyond the realm of imagination that opposing counsel may improperly pressure a physician to release information to satisfy a client's interests.<sup>164</sup> Likewise, determining what is and what is not confidential information is not always clear. A physician should not be placed in the position of deciding what information can be released since he, experiencing the same problems courts face, may not be able to determine the extent to which a patient's privilege may be waived.<sup>165</sup>

Informal contacts may also lead the physician into a situation where he becomes a witness against a patient,<sup>166</sup> a result contrary to the theory of undivided loyalty owed by the physician to the patient.<sup>167</sup> The physician may even become a potential third party defendant if his treatment exacerbated the patient's injuries, and the opposing counsel, seeking information benefiting the defense, may become a witness to the damaging admissions of the treating physician.<sup>168</sup> Thus, if *ex parte* conferences

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160. *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 802 (N.D. Ohio 1965).

161. *Id.* at 799.

162. Note, *Legal Protection of the Confidential Nature of the Physician-Patient Relationship*, 52 COLUM. L. REV. 383, 397-98 (1952). A tort action against the treating physician who discloses confidential communications can be brought against the physician due to his breach of confidence. See also Note, *Medical Practice and the Right to Privacy*, 43 MINN. L. REV. 943 (1959).

163. *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986).

164. *Anker v. Brodnitz*, 98 Misc. 2d 148, 153, 413 N.Y.S.2d 582, 585, *aff'd*, 73 App. Div. 2d 589, 422 N.Y.S.2d 887 (1979). See also *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965). In *Hammonds*, a treating physician was induced to disclose medical information concerning one of his patients because the insurer falsely stated that a malpractice action was being brought against him.

165. A cursory reading of the complaint by a layman will usually not clearly indicate whether the patient's physical condition is an issue in the case. Judicial scrutiny is required. Thus, without legal advice, a physician will usually not be able to determine when he can and cannot disclose medical communications.

166. *Alston v. Greater Southeast Community Hosp.*, 107 F.R.D. 35, 38 (D.D.C. 1985). For example, if a patient brings a cause of action against another party claiming that the patient's condition was worsened by the other party's conduct, if the physician is called to the stand, the physician could be in a position which would require him to testify against his patient. "Such a situation not only results in a clear conflict of interest, but could compromise the course of treatment being provided to the plaintiff as a patient." *Id.*

167. *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793, 799 (N.D. Ohio 1965).

168. *Alston*, 107 F.R.D. at 38. If the physician makes damaging admissions concerning the manner in which he treated the patient, then the defense attorney could be placed in the role of a witness for the plaintiff if a malpractice suit is initiated.

were permitted, the physician would not only be doing a disservice to the patient, but possibly to himself as well. By using formal discovery devices, the presence of the patient's counsel when a treating physician is deposed ensures that the physician does not disclose personal confidences of the patient. The patient's counsel "helps to protect the doctor from unwittingly and improperly disclosing medical information about his patient."<sup>169</sup>

The arguments that the taking of a deposition is costly, is inefficient, and leads to scheduling problems are not sufficient to justify *ex parte* conferences.<sup>170</sup> The rules of civil procedure prescribe various methods of retrieving information from parties and witnesses that seek to decrease the cost of litigation. As long as prudence is exercised by counsel requesting medical information, alternative discovery devices may be utilized to retrieve the requested material. Opposing counsel can issue written interrogatories,<sup>171</sup> or a deposition upon written questions may be filed.<sup>172</sup> Further, if the patient submits to an adverse medical examination and the patient requests a copy of the examination, opposing counsel is entitled to receive a copy of the medical report from the patient's examining physician.<sup>173</sup> Given the procedures that exist to help decrease the cost of litigation, the hardships faced by opposing counsel are not substantial enough to carve an exception into the well-established rules of discovery.<sup>174</sup>

Strict adherence to formal discovery procedures does not suppress the truth surrounding the patient's injuries. Ohio's rule limiting discovery to those processes defined in the rules of civil procedure "merely regulates the discovery process so as to protect the confidential relationship existing between a patient and his treating physician."<sup>175</sup> No "truth" is kept out of court since the same information procured

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169. *Wenninger v. Muesing*, 307 Minn. 405, 411, 240 N.W.2d 333, 336 (1976).

170. Both federal and Ohio civil rule 30 permit either party to depose anyone, party or nonparty, who might have information within the scope of discovery as set out in rule 26. Rule 30 calls for an oral deposition, and, if the deponent is a nonparty, a subpoena must be used in order to compel the deponent's presence. It is undisputed that there may be scheduling problems, but it is the obligation of both parties to solve these conflicts and to make the litigation run as smoothly as possible. Further, the rules of civil procedure have made the litigation process more efficient by reducing the amount of time required before the judge and jury, thus striving to make each case less costly to taxpayers. As those who oppose the use of the rules of civil procedure contend, a higher cost may be passed on to the litigants, but this appears to be justified since they are the ones principally involved in the suit.

171. Federal and Ohio civil rule 33 allow the parties in an action to submit written interrogatories to each other. The responding party and his attorney then sit down and prepare written responses to the interrogatories. Since the responding party and his attorney can sit down at their own convenience, scheduling problems are diminished. Further, a lower cost is attributable to written interrogatories since they are prepared and answered in the attorney's office using his resources.

172. Federal and Ohio civil rule 31 allow either party to depose anyone using written questions. The deponent attends the deposition and is read the written questions by a person designated to preside at the deposition. The deponent's responses are recorded and made available to both parties. Rule 31 written depositions are typically cheaper than rule 30 oral depositions since under written questions, counsel does not have to be present when the questions are being answered. However, the party formulating the questions does have to work under the handicap of not knowing what the answers will be to initial questions and must draft subsequent questions that will elicit the desired information necessary for the party's case.

173. Federal and Ohio civil rule 35 allow the defendant to request the plaintiff to submit to a medical examination to determine the extent of the injuries. This will give the defendant an opportunity to evaluate the claim for any exaggeration or fraud. While a plaintiff may agree to be examined without resorting to rule 35, certain provisions of rule 35 nonetheless apply. Both parties may receive a copy of the evaluation.

174. *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (D. Alaska 1983); *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 598, 499 N.E.2d 952, 963 (1986), *cert. denied sub nom. Tobin v. Petrillo*, 107 S. Ct. 3232 (1987).

175. *Petrillo*, 148 Ill. App. 3d at 603, 499 N.E.2d at 969.

through *ex parte* conferences may be acquired by following formal discovery procedures.

If opposing counsel decides to depose the treating physician, the patient's counsel has a right to be present. His presence, however, is not mandated to monitor or invade the work product of opposing counsel. Rather, his presence assures the patient that the trust between the physician and patient is not breached.<sup>176</sup> Patient's counsel is present to protect confidential information and to ensure that the physician's responses concern relevant issues.<sup>177</sup>

The rules of civil procedure will also prevent opposing counsel from inquiring into facts that are irrelevant to the lawsuit or that do not lead to the discovery of admissible evidence.<sup>178</sup> A patient's counsel should ensure that opposing counsel does not stray down forbidden paths.

In addition, private conversations with a patient's physician are not contemplated by the rules of civil procedure and are thus improper.<sup>179</sup> The fact that the rules do not explicitly bar *ex parte* conferences does not justify their use. The rules enumerate permissible procedures. These procedures are the exclusive means by which information pertaining to a patient's physical condition may be obtained.<sup>180</sup> Rules cannot be expanded to satisfy personal desires; strict adherence to these rules affords continuity and certainty in the judicial process.

The General Assembly's determination to limit discovery to those procedures enumerated in the rules of civil procedure does not give the patient a proprietary right to the testimony of his physician. By using the rules to their full potential,<sup>181</sup> both sides experience equal access to the treating physician. The physician is free to form and express his opinion concerning the cause, nature, or extent of the patient's injuries. This freedom of disclosure cannot be suppressed merely because the physician renders medical treatment and advice to the patient.<sup>182</sup>

176. *Wenninger v. Muesing*, 307 Minn. 405, 411, 240 N.W.2d 333, 336 (1976).

177. *Alston v. Greater Southeast Community Hosp.*, 107 F.R.D. 35, 37 (D.D.C. 1985); *Roosevelt Hotel Ltd. Partnership v. Sweeney*, 394 N.W.2d 353, 357 (Iowa 1986). Using federal civil rule 30(c) and Ohio civil rule 30(C), the patient's counsel can submit an objection during a deposition to preserve the objection for the court.

178. *Alston*, 107 F.R.D. at 37; *Wenninger*, 307 Minn. at 410, 240 N.W.2d at 336.

179. *Garner v. Ford Motor Co.*, 61 F.R.D. 22 (Alaska 1973); *Weaver v. Mann*, 90 F.R.D. 443, 445 (N.D. 1981); *Wenninger*, 307 Minn. at 405, 240 N.W.2d at 333.

180. *Wenninger*, 307 Minn. at 410, 240 N.W.2d at 336.

181. Either party may depose the physician orally, see *supra* note 170, or through written questions, see *supra* note 172. Further, opposing counsel can obtain all of the plaintiff's relevant medical records from the treating physician pursuant to both federal and Ohio civil rule 16. Rule 16 allows the court, in its discretion, to conduct pretrial conferences to obtain information that will enable the efficient disposition of the action.

[T]he Court ordered exchange of medical reports and information, pursuant to a theory that a pretrial disclosure of privileged information, without the necessity of waiver, is a valid means to enable counsel to prepare for trial and disposition upon the merits of any litigation, and is, therefore, an order that would be sanctioned by [federal and Ohio civil rule 16].

Rice, *supra* note 88, at 2 (emphasis in original).

182. *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 597-98, 499 N.E.2d 952, 963 (1986), *cert. denied sub nom. Tobin v. Petrillo*, 107 S. Ct. 3232 (1987). The court stated:

Moreover, we do not believe that a treating physician is "neutralized" merely because he provides medical assistance to a patient-plaintiff. If, in treating a patient, a physician forms an opinion as to the cause, nature, or extent of a patient's injury, that physician is in no way . . . prohibited from voicing that opinion in a court of law. . . . [B]y barring *ex parte* conferences, we do not "neutralize" the opinion of a treating physician; instead, we merely insure that the opinion of that treating physician is disclosed in a manner that not only



The trust placed in a physician can never be restored through protective orders granted by the court. "[A]n 'after the fact' ruling by a trial court will [not] sufficiently remedy the potential breaches of trust that will occur should defense counsel be given an unfettered right to engage in *ex parte* conferences with a patient's treating physician."<sup>183</sup>

Limiting the retrieval of information to those procedures outlined in the rules of civil procedure furthers the goals of discovery. By adopting the current version of the physician-patient privilege, the Ohio General Assembly has "facilitate[d] the efficient presentation and resolution of controversies."<sup>184</sup> As long as attorneys follow the rules of civil procedure, neither the patient nor the physician will be placed in a situation where any fiduciary obligation may be breached.

#### E. Where Has the Waiver for Voluntary Testimony Gone?

Before the adoption of the Tort Reform Act of 1987, section 2317.02 permitted a waiver of the physician-patient privilege when a patient voluntarily testified concerning his mental or physical condition.<sup>185</sup> This exception, however, no longer expressly exists.<sup>186</sup> The rationale behind the inclusion of this exception was that the purpose of the privilege was no longer served when a patient disclosed information concerning his condition or treatment.<sup>187</sup>

Under the immediate predecessor to section 2317.02,<sup>188</sup> courts determined that a patient voluntarily testified when he released information under direct examination<sup>189</sup> or in a patient-initiated deposition called to perpetuate the patient's testimony.<sup>190</sup> If the patient voluntarily took the stand and disclosed the information,

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discovers the truth, but also protects the confidential and fiduciary relationship existing between a patient and his physician.

*Id.*

183. *Id.* at 601, 499 N.E.2d at 966. The trial court can issue *in limine* motions and protective orders and thus attempt to protect the patient's privileged communications with his physician. It is difficult, however, to perceive how an *in limine* motion or a protective order "... can realistically restore a patient's trust and confidence in his treating physician after it has been disclosed that the physician whom the plaintiff approached for help has been, without the patient's consent or knowledge, engaging in private conferences with that patient's legal adversary." *Id.*

184. R. FIELD, B. KAPLAN, AND K. CLERMONT, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 57-77 (5th ed. 1984).

185. *See supra* note 39.

186. *See supra* note 48.

187. WIGMORE, *supra* note 7, § 2388, at 856. Professor Wigmore stated that:

[t]he party's own voluntary testimony, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue. . . . Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law when a plaintiff describes at length to the jury and a crowded courtroom the details of his supposed ailment and then is permitted to suppress the available proof of his falsities by asserting that he wishes to keep the matter confidential.

*Id.* at 856-59 (emphasis in original).

188. *See supra* note 39.

189. *Harpman v. Devine*, 133 Ohio St. 1, 5-9, 10 N.E.2d 776, 780 (1937); *Cuthbertson v. Cincinnati Union Terminal*, 103 Ohio App. 385, 388, 145 N.E.2d 467, 470 (1957); *York v. Roberts*, 9 Ohio Misc. 2d 19, 460 N.E.2d 326 (1983).

190. *Covington v. Sawyer*, 9 Ohio App. 3d 40, 48-49, 458 N.E.2d 465, 471 (1983); *In re Roberto*, 106 Ohio App. 303, 306, 151 N.E.2d 37, 41 (1958); *In re Loewenthal*, 101 Ohio App. 355, 134 N.E.2d 158 (1956); *Pacheco v. Ortiz*, 11 Ohio Misc. 2d 1, 463 N.E.2d 670 (1983).

the patient was deemed to have waived the privilege.<sup>191</sup> However, when the patient is placed in a defensive posture, any privileged information disclosed will not waive the privilege since the patient did not voluntarily disclose the communications. Thus, following established precedent, if the privileged information is disclosed during the patient's deposition through cross-examination by adverse counsel, the physician-patient privilege is not waived and the physician cannot disclose the privileged information.

There was some debate in the Ohio courts about the extent to which the patient needed to testify before the privilege was voluntarily waived. Did generally alluding to the patient's physical condition waive the privilege, or must the reference be more specific? In *Harpman v. Devine*,<sup>192</sup> the court determined that commenting generally on the patient's physical condition was not detailed enough to voluntarily waive the privilege. The patient needed to testify fully about his physical condition to waive the privilege.<sup>193</sup> By mentioning the physician's name and by testifying fully as to the injuries, symptoms, and complaints, the patient waived the privilege. The physician, however, could testify only to those matters upon which the patient had voluntarily testified.<sup>194</sup>

In *Harpman*, the court stated that if the General Assembly had intended to include statements made during both direct and cross-examination as effectuating a waiver, it would have left the word "voluntarily" out of the statute.<sup>195</sup> The current version of section 2317.02, however, not only deletes the word "voluntarily," but it eliminates this exception to the privilege when the patient testifies as to his physical condition.<sup>196</sup> Does this mean that voluntarily testifying no longer waives the physician-patient privilege? Further, if the statute contains a compulsory waiver for commencing an action, is it necessary to have a waiver when the patient testifies?

As noted previously, the physician-patient privilege is in derogation of the common law and therefore must be strictly construed.<sup>197</sup> The privilege, according to the Ohio Supreme Court in *State ex rel. Lambdin v. Brenton*, applies to those relationships expressly stated in the statute.<sup>198</sup> Thus, if the waiver is not expressly set forth in the statute, the privilege is not waived.

Clearly there is no need to establish a waiver for a patient who commences an action by filing a suit. In such an instance, the current physician-patient privilege sets forth a compulsory waiver. Thus, if the patient is also the litigant who files an action, the privilege is waived regardless of whether the litigant voluntarily testifies regarding his physical condition. A witness, however, cannot "file" a cause of

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191. *Ausdenmoore v. Holzback*, 89 Ohio St. 381, 383, 106 N.E. 41 (1914). Voluntarily testifying about one's physical condition is deemed to be an express waiver.

192. 133 Ohio St. 1, 10 N.E.2d 776 (1937).

193. See also *Baker v. Industrial Comm'n*, 135 Ohio St. 491, 493-95, 21 N.E.2d 593, 596 (1939); *Roberto*, 106 Ohio App. at 309-10, 151 N.E.2d at 40; *Cuthbertson*, 103 Ohio App. at 390, 145 N.E.2d at 471.

194. *Baker*, 135 Ohio St. at 498, 21 N.E.2d at 596-97.

195. *Harpman v. Devine*, 133 Ohio St. 1, 9, 10 N.E.2d 776, 780 (1937).

196. See *supra* note 48.

197. *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947).

198. *State ex rel. Lambdin v. Brenton*, 21 Ohio St. 2d 21, 24, 254 N.E.2d 681, 683 (1970). See also *Weis*, 147 Ohio St. at 428-29, 72 N.E.2d at 252.

action, and thus does not fall under the enumerated waivers in section 2317.02. Due to the absence of an exception when the patient testifies concerning his physical condition, it is presumed that a witness can never waive his physician-patient privilege.

For example, assume that *X* is a witness in *Y*'s personal injury action against a restaurant. *X* and *Y* had dinner together at the restaurant, and they ate the house salad dressing that allegedly gave both of them food poisoning. *X* and *Y* sue separately. *Y* calls *X* as a witness, and *X* takes the stand during direct examination and states that he had the house salad dressing, contracted food poisoning, and was treated by Dr. *Z*. Due to the change in section 2317.02, it is presumed that *X* has not waived his physician-patient privilege even though he disclosed privileged information openly in court. By openly testifying that he contracted food poisoning and by disclosing significant parts of his communications with his physician, *X* should be held to have waived his physician-patient privilege since the purpose underlying the privilege no longer exists when the patient openly discloses his medical ailments.<sup>199</sup>

Under this scenario, counsel for the restaurant would be denied information concerning the validity of *X*'s claim, and thus would be unable to fully cross-examine *X*. *Y*, on the other hand, would benefit from *X*'s assertion of the physician-patient privilege since *X*'s untested statements would help *Y*'s case. *X* should not be entitled to withhold information that may be extremely relevant in *Y*'s suit simply because he is a witness. By disclosing significant parts of his communications with his physician, *X* should be compelled to disclose the truth of his physical condition that he has freely placed before the court.

If the testimonial waiver is re-established within the physician-patient privilege, the word "voluntarily" will need to be omitted. Following court precedent, a witness may never be in a position to "voluntarily" testify. The witness would never be in charge of direct examination or of the deposition to perpetuate his testimony.<sup>200</sup> For example, California Evidence Code section 912 states that the right of a patient to claim the privilege "is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication."<sup>201</sup> The court in *Jones v. Superior Court*<sup>202</sup> held that even though a witness could not waive the privilege through the physician-litigant exception, the witness could waive the privilege by freely disclosing the communications in court. Ohio should adopt a provision similar to the California statute. The rationale of the privilege is not furthered when a witness' medical information is withheld even though the witness freely testifies concerning his injuries, symptoms, and complaints.

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199. *Jones v. Superior Court*, 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981). In *Jones*, the court recognized that a witness could not place her physical condition at issue in the proceeding pursuant to § 996(a) of the California Evidence Code. However, since the witness in *Jones* voluntarily testified about her condition, pursuant to § 912 of the California Evidence Code, she waived her physician-patient privilege. This is logical since it would be a twist upon logic to hold that the privilege still exists even though the physical condition of the witness has already been publicly communicated.

200. See *supra* notes 190-91.

201. CAL. EVID. CODE § 912 (West 1966 & Supp. 1988).

202. 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981). For further elaboration, see *supra* notes 106 and 199.

## IV. CONCLUSION

The General Assembly, in its current version of section 2317.02, has made considerable progress toward making the physician-patient privilege a fairer and more beneficial legal tool. Allowing the privilege to be waived when a personal injury action is filed no longer allows the patient to hide behind the privilege to the detriment of defense counsel. Indeed, when the patient files a personal injury action, the justification behind the privilege no longer exists. This change allows counsel more time to concentrate on the merits of the case rather than the procedural confrontations of retrieving medical information.

Limiting the retrieval of medical information to those mechanisms outlined in the rules of civil procedure should reduce the judicial quagmire experienced by other states. The rules of civil procedure facilitate the efficient operation of the judicial system. As such, the Ohio General Assembly was judicious when it decided to explicitly confine the retrieval of information to the rules of civil procedure.

Further legislative refinement of the privilege, however, should occur. Eliminating the waiver when a person testifies about his physical ailments allows a witness to disclose his entire medical history without waiving the privilege. If a witness is not deemed to have waived his physician-patient privilege upon freely and openly disclosing medical communications, a court may not have all of the relevant information before it.<sup>203</sup> As the physician-patient privilege currently stands, a witness may allege a physical injury or ailment, yet opposing counsel may not be able to obtain the witness' medical records to verify the witness' assertions. This hinders the pursuit of justice. Therefore, the Ohio General Assembly should correct this oversight before a litigant is harmed by its absence.

*Robert A. Wade\**

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203. See *supra* note 106.

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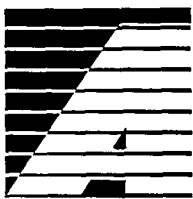
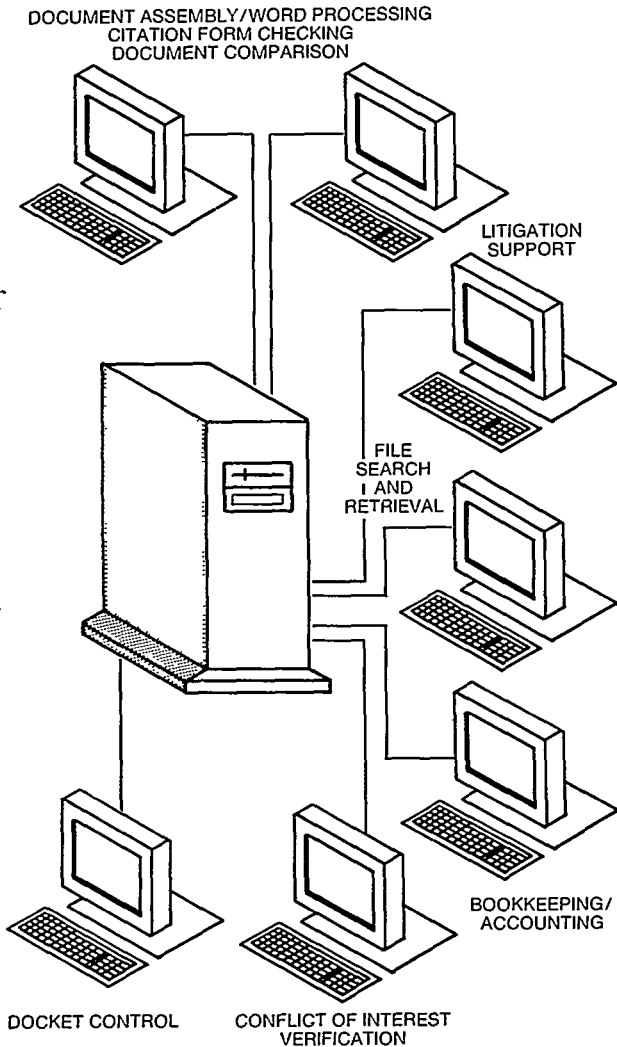
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